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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 26.

UNITED STATES OF AMERICA, PETITIONER,

VS.

JAY G. WILLIAMS, CHARLES R. FORD, JOHN S. BOMBACI AND JOSEPH V. PERRY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT, CHARLES R. FORD.

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OPINION BELOW.

The opinions of the Court of Appeals (R. 378-394) are reported at 179 F. 2d 644.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 10, 1950 (R. 394). On February 8, 1950, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to and including March 11, 1950 (R. 395). The petition was filed on March 9, 1950, and was granted on October 16, 1950. The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED.

1. Does Section 19 of the Criminal Code, Title 18, U. S. C., Sec. 51, which makes punishable as a felony a conspiracy by two or more persons to injure, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, contemplate and encompass a local offense of assault and battery committed by a police officer and others in the course of a criminal investigation in which third degree methods were employed for the purpose of gaining confessions and admissions?

2. Is Section 19, when employed to prosecute for a conspiracy to deprive citizens of rights secured by the Fourteenth Amendment, unconstitutional in that it fails to provide a reasonably ascertainable standard of guilt?

3. If Section 19 can be employed to prosecute for a conspiracy to deprive citizens of rights secured by the Fourteenth Amendment, is it not essential that the jury be instructed that, to convict, they must find that the de-

fendants conspired with the wilful intent to deprive citizens of such rights?

4. Where a defendant was tried with others charged under Section 20 with commission of the substantive act and was acquitted under instructions to convict if the jury found that he had committed the act or had aided, abetted, counseled, commanded, induced, procured, incited, encouraged, or assisted any one in its commission, can the defendant subsequently be legally convicted of a conspiracy to commit the substantive act, charged under Section 19, upon evidence in all material respects the same as that adduced at the first trial?

STATUTE INVOLVED.

Section 19 of the Criminal Code, 18 U. S. C (1946 Ed.) 51, now 18 U. S. C. (1948 Rev.) 241; provided as of the dates involved in this case:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

CONSTITUTIONAL PROVISION INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * * * *
>
> "Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT.

On April 22, 1949, the respondents and two others, Yuhas and Dania Supply Company, were convicted in the United States District Court for the Southern District of Florida on all counts of a four count indictment. Each count charged violation of Section 19 of the Criminal Code (R. 1, 337, 356-365). Williams was sentenced to two years imprisonment, to run concurrently with a four year sentence previously imposed for conviction upon a charge laid under Section 20, Criminal Code, now before the Court in Cause No. 365 (R. 356).

The other respondents were each sentenced to imprisonment for one year and one day on Count One and to one year on each of Counts Two, Three and Four, to run concurrently, but consecutively to that imposed as to

Count One. The sentence as to Counts Two, Three, and Four in each case was suspended and each defendant was placed on probation for three years following completion of service of the sentence imposed as to Count One (R. 357-361).

Yuhas received a like sentence, all of which was suspended (R. 362).

A fine of $100.00 imposed upon each respondent and upon Yuhas was remitted.

Dania Supply Company (R. 362) was fined $4,000.00.

Count One of the indictment (R. 1), in substance, charges that on or about March 28, 1947, Williams and Perry, being special police officers, and Ford, being an employed police officer, all of The City of Miami, acting under the laws of the State of Florida and ordinances of the city, together with Bombaci, Yuhas and Dania Supply Company, conspired to deprive Frank J. Purnell, Jr., a citizen of the United States, of the rights and privileges secured to him and protected by Amendment XIV of the Constitution of the United States.

The rights and privileges alleged to be so protected being:

1. Not to be deprived of liberty without due process of law;

2. To be secure in his person while in custody of the State of Florida;

3. Not to be subjected to punishment without due process of law;

4. To be immune, while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of the said state; and

5. To be tried by due process of law and, if found guilty, to be sentenced and punished in accordance with the laws of the State of Florida.

The plan and purpose of the conspiracy, in substance, is alleged to be that the defendants (respondents) would arrest and detain Purnell in a building on the premises of Dania Supply Company and there illegally assault, beat and torture him in order to force him to admit an alleged theft of personal property belonging to Dania Supply Company, to force him to accuse others of participating in such thefts and to impose illegal summary punishment upon him.

It is alleged that the conspiracy was formulated and entered into by Ford, Williams and Perry, while acting in their official capacities.

Counts Two, Three and Four of the indictment are in all material respects identical to Count One, with the exception of the name of the subject of the alleged assault. In Count Two (R. 3), the person named as the subject of the alleged assault is Chester M. Robinson; in Count Three (R. 4), he is Henry W. Priest; and in Count Four (R. 5), he is John P. Sturniolo.

Testimony at the trial developed that Dania Supply Company, a lumber dealer, had engaged the Continental Detective Agency, headed by Williams, to investigate the loss or disappearance of lumber and building supplies. Perry, Bombaci and one Giroux, a witness for the Government, were employees of the detective agency, directed by Williams to work with him on this assignment. Ford, at that time a police patrolman on the Miami police force, was assigned by his superiors to assist in the investigation (R. 260-262). Yuhas was employed by the supply company as its comptroller and was assigned by an officer of the company to assist Williams.

All of the complaining witnesses were employees of the supply company at the time in question and each testified in substance that on or about the dates mentioned in the indictment, he had been called into a building, referred to as the paint shack, on the company's premises, and there questioned by the individual defendants (respondents and Yuhas) and Giroux concerning, and accused of, the theft of building supplies from the company.

Each testified that in the course of this investigation he was beaten, by being struck with fists and instruments, described as a dowel stick in some instances or a weighted rubber hose in other instances, in an effort to induce him to admit that he had stolen the company's property and further to induce him to implicate others in such thefts.

Each of the complaining witnesses was dealt with separately in the paint shack and each of the individual defendants (respondents) was present in the shack during some part of the questioning of each of the complaining witnesses.

There was no testimony that Ford, Perry or Yuhas engaged in the actual beating, the complaining witnesses testifying that Williams administered most of the blows, Bombaci participating to a lesser extent.

At the conclusion of the questioning of Purnell, he was released, the other complaining witnesses were lodged in the City Jail, and later, within a day or two, released.

The testimony of the complaining witnesses as to their treatment in the paint shack was corroborated by a Government witness, Henry B. Giroux.

Their testimony was further corroborated by witnesses who testified to marks and bruises being visible upon the bodies of the complaining witnesses shortly after the date of the occurrences in the paint shack.

The Government's evidence was sufficient to show that the defendants employed third-degree methods, and there was no evidence offered in denial of this. Aside from character evidence offered by Ford and evidence that he had been assigned by a superior to assist in the investigation (R. 257-266), no evidence was received from the defendants except in support of motions with instructions that such exhibits so received would not go to the jury (R. 253).

It is necessary to point out that, prior to the indictment and trial of the respondents as above stated, they had been tried in January, 1949, in the same Court on an indictment of eight counts in Cause numbered 7279-M-Cr. The record of these proceedings is before the Court in Cause numbered 365. The odd numbered counts of that indictment charged offenses, in substance, identical to those of the indictment in the case at bar. The even numbered counts of the previous indictment charged violation of Section 20 of the Criminal Code. These counts charged the commission of the acts which are made the object of the conspiracy alleged both in the odd numbered counts of the prior indictment and in the counts of the indictment in the case at bar; in other words, they charged commission of the substantive offense under Section 20 and not the conspiracy. The indictment in Cause numbered 7279 was received as defendants' Exhibit "D" (R. 254).

In the trial of the prior case, the Court charged the jury, *inter alia*, that if *any* of the defendants in any way aided, abetted, encouraged, or gave counsel in the commission of the overt act charged, he would be guilty as a principal. This charge was received as defendants' Exhibit "E" (R. 254) in support of defense motions relating to *res judicata* and former jeopardy. The pertinent por-

tions of the charge are found on pages 321, 322, 328, 330, 332, of the record in Cause No. 365, and are copied into the respondent Ford's proffered amendment to his motion to dismiss the indictment (R. 19).

The prior trial resulted in a verdict of guilty as to Williams and not guilty as to the other defendants of the even numbered counts charging violation of Section 20, and in a mistrial, the jury being unable to agree, of the odd numbered counts charging violation of Section 19, the conspiracy counts. The verdict in that case was received as defendants' Exhibit "F" (R. 254).

The record of the prior trial is presently before this Court in Cause No. 365, and reflects that in all material respects the evidence taken by the Government then is substantially the same as that taken by the Government in the case at bar.

Objection was made by the respondents, other than Williams, to the testimony of Government witnesses, relating to events that transpired in the so-called paint shack upon the ground of *res judicata*, and by Williams upon the ground of former jeopardy. Such objections were overruled (R. 42-44, 56, 72, 77, 80-81).

The Court refused to give a portion of the third jury instruction requested by the respondent Ford, which portion states in substance that the action of the jury in acquitting all but Williams in the prior trial of the substantive acts which are made the object of the alleged conspiracy forecloses the question in their favor as to whether or not such other defendants (respondents) did commit the acts alleged or aided, abetted, encouraged, counseled, commanded, induced, procured or in any way assisted any other person to commit such acts (R. 286-287, 293, 324-325).

The Court refused to give the third requested charge of all of the defendants (respondents) as it was submitted, and struck therefrom, where they appeared, the words "wilful" and "wilfully," the defendants having requested in substance, that the Court charge that to find a conviction the jury must find that the defendants conspired to commit the acts, alleged as the object of the conspiracy with wilful intent (R. 278, 293, 322-323).

The Court of Appeals for the Fifth Circuit, on January 10, 1950, reversed the respondents' convictions, and quashed the indictment upon the ground that the Statute Section 19, when applied to the "due process" provision of the Fourteenth Amendment, fails validly to create a crime because of the extreme vagueness of the provision "Nor shall any State deprive any person of life, liberty or property without due process of law" (R. 380), 179 F 2d 644, 647.

The Court of Appeals further expressed the opinion that, if it is determined that Section 19, when applied to the Fourteenth Amendment, does create a crime, then the Trial Court erred in giving inconsistent charges on the nature of the offense and in refusing to charge that a wilful deprivation of a known federal right was a necessary element of the conspiracy (R. 382-383), p. 648.

The Court expressed the further opinion that the Trial Court erred in excluding from evidence the record and the charge of the Court in the prior case in which all but Williams were acquitted of the substantive act.

Judge Waller concurred in the opinion and concurred especially. Judge Holmes dissented.

SUMMARY OF ARGUMENT.

I.

Section 19, Criminal Code, when applied to the due process provision of the Fourteenth Amendment, because of the extreme vagueness of that provision, is lacking in an ascertainable standard of guilt and therefore fails to validly create a crime.

When applied to such provision, Section 19 is subject to all and the same criticism for vagueness as is Section 20, and is not saved by use of the word "wilful," as that word is construed in *Screws* v. *United States*, 325 U. S. 91. The words "wilful" or "wilfully" are not found in Section 19, nor were they included in the indictment although the term "under color of state law," likewise omitted from the Statute, was employed in the indictment.

A statute, which has lain dormant as applied to certain acts for a long time and generally considered to be no crime, should not suddenly be resurrected and, by unusual and strained judicial construction and interpretation, be made to apply to such acts, making their commission a crime. Such practice is as objectionable as passage of *ex post facto* laws.

The Fourteenth Amendment does not secure rights or privileges as between citizens, but protects persons from deprivation of certain fundamental rights by State action. *United States* v. *Cruikshank*, 92 U. S. 542.

Since the term "under color of state law" is not included in Section 19, the Statute does not warn police officers that the act applies to their actions as such, making them the acts of the State.

If the acts of respondents amounted to conspiracy to violate Section 20, then they would be subject to punishment under the general conspiracy statute, Title 18, U. S. C. 88, Section 37, Criminal Code, at the time of the alleged offense. The penalty provided by Section 37 is much less severe than that provided by Section 19.

Examination of Congressional debate concerning the Enforcement Act of 1870 (Act of May 31, 1870, C. 114, Stat. 141) and particularly concerning Section 6 of the Act which has, with some alterations, become Section 19, indicates that the primary purpose of the proponents of the Bill was to protect the new citizens in their right to vote (Congressional Globe, 41st Congress, 2d Session, 3503, 3808). It is an Act to enforce the provisions of the Fifteenth Amendment.

Section 6 of the Act was intended to prevent unlawful combinations, such as the Ku Klux Klan, from intimidating persons and thereby contravening the rights conferred by the Fifteenth Amendment (Congressional Globe, 41st Congress, 2d Session, 3550, 3611).

Third-degree methods have been openly employed by police departments in various sections of the country for years. This fact must have been known to the Court and to officers of the Department of Justice because of the cases which have come to the Court involving confessions obtained by such methods, and yet no federal action has been taken to punish officers employing such methods until the prosecution here. The Screws case is not analogous because the acts there committed were not done pursuant to an investigation but were done through malice. Even so, a demurrer was there sustained to a count charging violation of Section 19. These facts would lead a reasonably prudent man to believe that Section 19 does not

apply to third-degree methods employed by police officers.

The Report of The President's Committee on Civil Rights, entitled, "To Secure These Rights," indicates the inadequacy of Sections 19 and 20 for employment by federal authorities in enforcement of rights protected by the Fourteenth Amendment as between individuals. It recognizes the fact that these sections do not "adequately define the conduct which is forbidden." It states that, in using these statutes, the Civil Rights Section "has been compelled to employ an experimental technique and to endeavor to extend the list of these rights, case by case" (P. 117).

It would appear that, by omitting the word "wilfully" from the indictment here and by using the term "under color of state law," the Government is deliberately attempting to enlarge the scope of Section 19, thus circumventing the Congress.

The fundamental rights of persons were and are not secured by the due process clause of the Fourteenth Amendment. They were secured by the people long before that Amendment was drafted. The secured rights which Section 19 is designated to protect for citizens are those rights made specific by expressed constitutional, statutory or similar provisions, and are not all human rights protected for the benefit of citizens and aliens alike and defined, if defined at all, only in the great mass of judicial decisions.

Surely Congress would not protect our citizens from abusive treatment by police officers and withhold such protection from visitors to this country.

II.

Since Section 19, when applied to rights found in the due process clause of the Fourteenth Amendment is lacking in an ascertainable standard of guilt to the same extent as is Section 20, then, in order to comply with the requirements of specificity laid down in the Screws case, it must be shown that the defendants intended, as the object of their conspiracy, to wilfully deprive citizens of rights secured by the Amendment.

The question is not whether defendants "wilfully" conspired, but whether they conspired to "wilfully" deprive citizens of rights secured.

If this requirement is not met, every time two or more police officers mistakenly make an arrest upon suspicion, they will be faced with prosecution for a most serious felony. See concurring opinion of Judge Waller in the case below, 179 F. 2d 644, 652 (R. 388).

The trial Court refused to instruct the jury that the defendants must have intended wilfully to do the act which was the object of the conspiracy, as distinguished from doing it knowingly, and the Court struck the word "wilfully" wherever it was used in requested charges (R. 278, 293, 322).

The Court did instruct that the defendants must have had a specific intent to deprive the complaining witnesses of rights and privileges guaranteed under the Fourteenth Amendment, but the Court also charged that it is not necessary that the defendants "would understand that what they were doing would be a violation of law. All that is necessary is that they should understand what they are doing. If what they thus understandingly cooperate to do is a violation of law, in this case a deprivation of constitutional rights, then the conspiracy will have been

established, even though the participants did not know that what they were doing would in fact be deemed to have been a deprivation or violation of any person's constitutional rights" (R. 319).

This instruction appears to be directly contrary to the criteria laid down in the Screws case, and, if so, is misleading and erroneous.

If so, it is not cured by the other instructions mentioned. It would be impossible for this Court to determine which of the instructions the jury followed, see *Mills* v. *United States*, 164 U. S. 644:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenback* v. *United States*, 326 U. S. 607.

The error is not cured where the jury is at liberty to follow the erroneous portion of the instructions, *Dr. J. H. McLean Medicine Co.* v. *United States*, 253 Fed. 694 (8th Cir.). An erroneous instruction is not cured by a subsequent correct one, unless the former is withdrawn, *Nicola* v. *United States*, 72 F. 2d 780 (3rd Cir.).

It is not sufficient that the jury may reach a right conclusion, the instruction must be so framed that the jury may not draw the wrong conclusion, *Miller* v. *United States*, 125 F. 2d 968.

III.

Prior to the trial in the instant case, the same trial defendants were tried in the same court on an indictment in eight counts. The odd numbered counts charged the defendants with conspiracy under Section 19 and are, in all material respects, identical to the four counts of the indictment here.

The even numbered counts charged violation of Section 20 and in effect charged the commission of the substantive act which is made the object of the conspiracy alleged in the odd numbered counts and in the counts of the indictment in the instant case.

The record of proceedings in the prior case is before this Court in Cause No. 365, *Jay G. Williams* v. *The United States.*

Williams was convicted of the even numbered counts charging violation of Section 20, the substantive charges.

All of the other trial defendants were acquitted of those counts.

A mistrial resulted as to all of the odd numbered or conspiracy counts.

The evidence adduced at the former trial is in substance the same as that adduced in the trial of the case at bar.

The evidence of the alleged conspiracy is confined to proof of the commission of the substantive act.

The Court in the prior case charged the jury that, if any of the defendants committed the substantive acts alleged or if any of them aided, abetted, counseled, commanded, induced, procured, incited, encouraged or assisted any one else in the commission of the act, it would be their duty to convict him (R. 321, 322, 328, 330, 332).

It is contended here as it was in the Circuit Court of Appeals and District Court that under such instructions and since the evidence of conspiracy is evidence of the commission of the act, the verdict in the prior case and that the question of whether or not the trial defendants, other than Williams, participated criminally in any way in the

performance of such acts was foreclosed in favor of such defendants by the verdict in the prior case.

The Court of Appeals did not rule that the prior acquittal barred the present action or that the questions raised in the prior trial were *res judicata* but did hold that the trial Court erred in refusing to admit the record of proceedings had and charge of the Court given in the first trial into evidence in the trial of the case at bar.

The Government contends that *res judicata* is a plea in bar which presents a legal rather than a factual question and in this we agree but we submit that the least that could have been done would have been to follow the procedure suggested by the Appeals Court.

The case of *Sealfon* v. *United States*, 332 U. S. 575, is authority for our contention that the question of whether or not the defendants, other than Williams, participated criminally in the commission of the substantive act alleged was determined in their favor by the verdict in the first trial and is *res judicata*.

ARGUMENT.

I.

Section 19, when applied to the due process provision of the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty or property without due process of law," fails validly to create a crime, because of the extreme vagueness of such provision.

In *Screws* v. *United States*, 325 U. S. 91, Mr. Justice Douglas, in whose opinion the Chief Justice, Mr. Justice Black and Mr. Justice Reed concurred, after considering the contention that Section 20 is unconstitutional when applied to the due process clause of the Fourteenth Amendment because it is lacking in an ascertainable standout of guilt stated, page 100:

> "Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result We do not reach it, for we are of the view that if Sec. 20 is confined more narrowly than the lower courts confined it, it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure."

The word "wilful" in the Statute was then held to be the saving feature.

The Statute under consideration is subject to all of the charges of vagueness laid against Section 20. It is defective for the same reasons assigned in the Screws case. It is lacking in the cure.

Mr. Justice Rutledge, concurring specially, said in the *Screws case* page 119:

"Sections 19 and 20 are twin sections in all respects that concern any question of vagueness in defining the crimes. There are important differences. Section 19 strikes at conspiracies, Sec. 20 at substantive offenses. The former protects 'citizens,' the latter 'inhabitants.' There are, however no differences in the basic rights guarded. Each protects in a different way the rights and privileges secured to individuals by the Constitution. If one falls for vagueness in pointing to these the other also must fall for the same reason. If one stands, so must both. It is not one statute therefore which we sustain or nullify. It is two."

If the defendants in the Trial Court could reasonably have been expected to know that the acts which they were alleged to have committed in conspiring to employ third-degree methods in the course of their investigation were in violation of a particular law of the United States, then they should be subject to punishment under that law.

If not, the Government should not subject the legal machinery of the United States to the criticism that acts under which persons are punished are so vague, so complicated, so veiled in ambiguities and so enforced that the laws are mere traps, that prosecutions become persecutions, and that defendants are unfairly and unjustly convicted.

For the Judiciary, by the employment of odd, unusual and strained construction, to suddenly make that act a crime which has long and generally been considered no crime is a practice as fraught with evil as is the employment of *ex post facto* laws, a practice deplored and condemned by free men.

"The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were

done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." The Federalist, No. LXXXIV (attributed to Hamilton).

How would the defendants at the trial know that conspiracy to employ third-degree methods is a federal offense?

If they read Section 19, they would not know, for nothing of the kind is mentioned there. The Statute says that they shall not conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.

If they are presumed to know the law, they will also know that the Fourteenth Amendment does not secure rights or privileges as between citizens but protects persons from deprivation of life, liberty or property without due process, by State action.

They will know that this Court, in *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, said, page 553:

> "The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'Governments are instituted among men, deriving their just powers from

the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

"The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bk.* v. *Okely*, 4 Wheat. 244, it secures 'The individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the Amendment."

As Judge Waller pointed out in his concurring opinion below, page 651 (R. 386):

"The right not to be beaten by two or more persons can hardly be said to be a right or privilege that is 'secured' to 'the free exercise and enjoyment' of any citizen of the United States. The terms 'free exercise' and 'enjoyment' connote active use or positive utilization of privileges rather than a mere passive possession thereof. It seems grossly inapt to speak of a person as 'having free exercise' of the privilege of being immune from assault and battery, or as having the 'free exercise and enjoyment' of the

> right to be tried and punished under the laws of Florida; or in freely exercising the right to be secure in his person while in the custody of the State of Florida. In short, one does not freely exercise or enjoy being in the custody of the State of Florida nor being tried and punished by due process of law. The citizen does, however, freely exercise or enjoy the privilege to vote, to assemble, to worship, to speak, or, that is, such privileges as are exercised or enjoyed by him out of his own activities."

But, the Government will say, at least one of these alleged conspirators was a police officer and even though he was acting in violation of the laws of his State, his actions were "under color of State law," and were therefore State action.

Where is there mention of the term "under color of State law" in Section 19? If our alleged conspirators look further, they will find that expression used in Section 20 which follows, under the heading in U. S. C., "Depriving Citizens of Civil Rights under Color of State Laws," but the term is not employed in Section 19, and since it is not, they may reasonably assume that it was not intended to be so employed, and that punishment of persons exercising State law, because of a misuse of such authority, is not contemplated by Section 19, being specifically mentioned in Section 20.

If the acts which the alleged conspirators contemplate are in violation of Section 20, they may reasonably expect prosecution under the general conspiracy Statute, then U. S. C., Title 18, Section 88, Section 37, Criminal Code, but the punishment provided under that Statute is much less severe than is provided by Section 19.

Assume that our alleged conspirators had examined the debates in the Congress concerning enactment of the

Enforcement Act of 1870 (Act May 31, 1870, Ch. 114, Stat. 141) which includes, as Section 6, the provision which, with some change, became by re-enactment Section 19.[1]

From these they would gather that the section was adopted solely for the purpose of protecting the rights secured by the Fifteenth Amendment. From statements of opponents to the measure, they might readily conclude that the whole purpose of the Act was to enable the majority party to maintain its majority. The unhappy history of this tragic era lends some support to this contention.

Mr. Bingham, speaking in the House of Representatives on May 16, 1870, in reporting the Bill (H. R. No. 1293) out of Committee, said (Cong. Globe, 41st Congress, 2d Session, 3503):

> "The object of the bill is to enforce the legal right of the citizens of the United States to vote in the several States of this Union—a right which is defiantly denied in my own State and in others, in direct contravention of the express letter of the Constitution of the United States."

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[1]Section 6, Ch. 114, Stat. 141, provided: "That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of a felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

Of course, as introduced, the Bill did not include the section under discussion here. (Cong. Globe, 41st Cong., 2d Session, 3503). That section subsequently was introduced as an amendment in the Senate by Senator Pool. Before such amendment was offered, Senator Stewart stated (Cong. Globe, 41st Cong., 2d Session, 3550):

> "* * * The Senator from North Carolina (Mr. Pool) has made some suggestions, and has prepared one or two sections which strike me very favorably. One of those sections provides against unlawful combinations to intimidate voters, which would come in properly in connection with this bill. It prevents intimidation outside of the immediate relation to registration and to voting, going upon the plantations, Ku Klux Klan, etc. * * *"

On May 19, 1870, Senator Pool stated (page 3611):

> "I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the Fifteenth Amendment."

Senator Pool also spoke of enforcing the rights protected by the Thirteenth and Fourteenth Amendments but in this connection it appears that he was speaking of those provisions, including the section which has become Section 20, of the Civil Rights Act of 1868, which were incorporated in the Senate Amendment to H. S. No. 1293.

Senator Stewart, speaking for the Bill, as amended in the Senate, on May 25, 1870, stated, page 3308:

> "Our law is only for the protection of the ballot-box. We proclaim now and here that we will exert all the power we can exert under the Constitution to protect the ballot-box in every State of the Union. We probably have not got enough legislation in this

bill on that subject, but if the occasion arises we will invent more. We will make the effort to see if it is in the power of this Government to prevent its being turned into anarchy and confusion by a conspiracy in New York or Georgia or Louisiana.

"That is one feature of this bill. It is a good bill. I say, 'let us have peace'; but peace upon what terms? The terms upon which we want peace and upon which we intend to have it, and the only terms upon which peace can be had, are that every citizen of the United States, without regard to color, shall have an equal opportunity to vote; that no State shall deny to any person, whether he is an alien or a native-born citizen, the equal protection of the laws; that while we have the power to regulate the time and the manner of elections for members of Congress we will not allow repeaters, if we can help it, but will have a fair vote of the people. We will have peace on the terms of protecting the citizens of the United States and by respecting the Constitution; and these are the only terms on which we can have peace."

Mr. Davis, speaking for the Bill in the House of Representatives, on May 27, 1870, page 3881, said:

* * * "In respect to the fourteenth article of amendments to the Constitution this bill contains two provisions. One is to enable a proceeding to be brought by writ of quo warranto against any person who enters upon an office in violation of the provisions of the Constitution of the United States. * * *

"The bill then provides a penalty for the person who shall enter upon the exercise of the duties of any office in violation of the Constitution; and that provision is so framed, it will be noticed, that it leaves in the discretion of the court the punishment, not a severe one at the worst, to be exercised according to the just discretion of the court."

It is interesting to note that Senator Bayard, speaking of Section 6 of the Bill, as amended, anticipated the

difficulties with which we are now confronted. He said, page 3804:

> "What a proposition! What are the 'rights or privileges secured to citizens by the Constitution and laws of the United States?' If you mean to make it an offense to invade these rights, it is your duty as legislators to point out the precise offense intended. That could be made the basis, with a partial court, with an excited and partial jury, to convict a man for an act apparently the most innocent, by raking up some possible right, throwing a drag-net over all the laws of the United States, and from all those extracting some possible exercise of a right or privilege which this party intimidated another from enjoying, * * *
>
> "Here, with this utterly indefinite charge against a man, something that no man could discover if he talked for a week, and undertook to point out all the possibilities that partisan ingenuity could define, the partiality of prejudiced jurors or judges may create that a felony of which no man dreams at this time, and which no man can define with that certainty which criminal justice requires you to exercise in creating statutory offenses of a high grade."

Now, another reason why these alleged conspirators could and should not be reasonably expected to anticipate federal prosecution under Section 19, for employing or planning to employ third-degree methods in the course of their investigation into the theft of lumber and materials, is the fact that this section has not been utilized for such purpose since its enactment in 1870.

The fact that such police methods have been employed for years by numerous police departments in various sections of the country is no secret. It is generally known. It would have been known by the defendants. It is and has been known to this Court by reason of the numerous

cases involving confessions obtained by such methods which are presented to the Supreme Court.

Surely the Department of Justice has known for many years that third-degree methods have been employed.

The enforcement officers of the Government enjoy an enviable reputation for their perseverance, thoroughness, and success in detecting the commission of federal offenses and in bringing the perpetrators to justice. Such a reputation would not be unknown to the defendants below. And yet, we fail to find where the Government has attempted to utilize the provisions of Section 19 to punish police officers for employing third-degree methods up to the time of the present case except in the Screws case, and there a demurrer was sustained to that count of the indictment charging a violation of Section 19, by order of the District Judge dated August 30, 1943.

Would not the fact that such practices have gone unnoticed by the officers charged with enforcement for some seventy-five years be reason enough for an ordinarily prudent man to believe that the employment of third-degree police methods does not constitute an offense under this section?

Indeed, if the alleged conspirators are presumed to know the law, would not the fact that a demurrer was sustained to Count One of the indictment in the Screws case, the count which charged violation of Section 19, indicate to them that Section 19 does not apply to the acts which they committed?

It is submitted that about the only way the defendants below could have anticipated that they might be prosecuted under Section 19 would be for them to have read the Report of The President's Committee On Civil Rights, en-

titled, "To Secure These Rights" published by the Government Printing Office in 1947. On page 117 of this pamphlet it is stated that:

> "The most serious difficulty which the Civil Rights Section has encountered in using these sections has been to determine the specific civil rights they protect. Presumably, the two laws protect any and all rights established by the Constitution or by federal statute. But the Constitution nowhere lists personal rights which may be protected by the government nor does any federal statute enumerate them. *In using Section 51 and Section 52 to protect specific rights, the Civil Rights Section has been compelled to employ an experimental technique and to endeavor to extend the list of these rights case by case.* Considerable success has been achieved in this undertaking, and action in the future may expand further the list of rights under Section 51 protected against interference by private individuals. The list of federal rights running against interference by state officers and protected by Section 52 is a somewhat more definite one. Decisions of the Supreme Court in recent years have read many of the rights established by the first 10 Amendments into the Fourteenth Amendment. This has made them federal rights against state interference.
>
> "*A further handicap under which the Section has worked has been the insistence of the courts that the use of these statutes should be governed by the traditional and wholly sound legal doctrine that criminal laws must adequately define the conduct which is forbidden. Because these statutes are vaguely worded, the courts have sometimes been reluctant to see them applied in specific situations. They have taken the position that the accused had not received sufficient warning from the vague terms of the statute that his conduct was forbidden*" (Emphasis supplied).

Had the defendants read the above quotation, there can be no legal presumption that they did, they might have

been put on notice that by their act they subjected themselves to becoming guinea pigs in an experiment by the Civil Rights Section in the employment of its technique.

The report indicates that even the proponents of a strong federal civil rights program are of the opinion that Section 19 is too vague to be enforceable so far as rights secured by the Fourteenth Amendment are concerned.

On page 104 the Committee said:

> "The Committee believes that national leadership in this field is entirely consistent with our American constitutional traditions. *It is true that the federal government does not possess broad, clearly defined delegated powers to protect civil rights which it may exercise at its discretion.* A detailed examination of the constitutional aspects of the civil rights problem makes clear that very real difficulties lie in the way of federal action in certain areas. It also makes clear that effective federal power does exist under the Constitution" (Emphasis supplied).

It would appear that in the instant case, the Government has undertaken to amend Section 19 to meet requirements of the Civil Rights Section by inserting portions of Section 20 into it by way of the indictment.

Section 19 makes no mention of "color of any law, statute, ordinance, regulation or custom," yet the phrase, "acting under color of the laws of the State of Florida" was inserted in the indictment evidently in order to make Section 19 the twin of Section 20 and to enlarge its scope.

What is the reason for this? Why is it more advantageous to the Government to employ Section 19 rather than the general conspiracy statute Section 37?

Of course, the penalty provision of Section 19 is much more severe than is that of Section 37, but another, though

more obscure reason, is suggested in the Committee Report abovementioned.

The Committee on page 116 complains that Section 52, Section 20 of the Criminal Code, is directed only against those deprivations of rights which are "wilful" and which occur "under color of any law." Section 52 is thus limited to the protection of rights against interference by public officers, whereas Section 51 may be used to prosecute private persons as well as public officers.

Now, if Section 19 can be used as a subterfuge for prosecuting offenses heretofore considered punishable only under Section 20, at least one of the Civil Rights Section's difficulties will be eliminated. The necessity of alleging and proving wilfulness will be obviated.

If this can be accomplished, and that accomplishment is sought here, we have no hesitancy in predicting that the next step in the experiment will be to eliminate the requirement that the act is done "under color of law" and thus the Civil Rights Section will have prevailed upon the Courts to do that which the Congress has so far failed to do in strengthening the Civil Rights program.

The word "wilful" is not used in the present indictment. Its omission, in view of the fact that the word holds such prominence in the Screws case, was, until he read the Committee report, difficult for the briefer to understand.

It appears now that such omission was a wilful attempt to circumvent the powers of the Congress.

Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson, in their dissenting opinion in the *Screws case*, 325 U. S. 91, 138, have clearly pointed out the injustice and unconstitutionality of this type of proceedings

under a vague enactment in Part II of their opinion, page 149. Nothing this writer could say would add to the expressions found there. We merely ask that they be incorporated by reference in this brief.

The opinions expressed by Judge Sibley and Judge Waller go directly to the weakness of the indictment and these expressions likewise are incorporated by reference.

The Government questions the statement by Judge Sibley, page 648 (R. 381), that,

> "In the conspiracy provision, the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the clause of the Fourteenth Amendment. The *citizen's* rights are *specifically* stated in the Constitution and statutes, and in them may be found a standard of conduct."

The Government, in Part I C of its brief, page 40, contends that, while Section 20 *protects* "inhabitants" and Section 19 *protects* "citizens," there is no difference between them with respect to the rights protected.

The fallacy of this argument is exposed by the opinion of Judge Waller, where it is said, page 651 (R. 387):

> "Section 51 is far more vague and indefinite than Section 52, and under the *Screws* case all that saved Section 52 from the abyss of invalidity was the word 'willful.' It is clear that Section 52 had reference to deprivation of rights of inhabitants—even though aliens—under the Fourteenth Amendment by its use of the phrase 'under color of any law, statute, ordinance, regulation, or custom.' Moreover, Section 52 prevents the deprivation not only of rights 'secured' but 'protected' by the Constitution and laws of the United States, while Section 51 does not embrace rights *protected* by the Constitution and laws. The rights

or privileges embraced in Section 51 are only those which are *secured* to the citizen by the Constitution and laws of the United States. The wording of Section 51 is not in harmony with the purposes which the United States seeks in this case to have the statute accomplish."

Then, as was pointed out in a previously quoted portion of Judge Waller's opinion, "The right not to be beaten by two or more persons can hardly be said to be a right or privilege that is 'secured' to 'the free exercise and enjoyment' of any citizen of the United States."

The fundamental human rights *protected* from State abuse by the due process clause of the Fourteenth Amendment were no more secured by that controversial instrument than were similar rights secured by the protections provided in the Bill of Rights attached to the Constitution. Some of the framers of the Constitution did not even consider it necessary or advisable to attach a Bill of Rights to the Constitution.

"It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege; reservations of rights not surrendered to the prince. Such was Magna Charta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representa-

tives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. 'We, The People of the United States, to secure the blessings of liberty to ourselves and our posterity, Do Ordain and Establish this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."

* * * * * * *

"I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights." The Federalist, No. LXXXIV (Attributed to Hamilton).

These rights were neither granted by the Government to the people nor secured by the Government for the People. They are rights which the people already had secured for themselves and which they intended to keep.

The Government cites cases to show that Section 19 has been employed to punish for violations of rights and privileges which do not "appertain to citizens as such," but it is believed that an examination of these cases will disclose that the rights or privileges violated were made specific, either by statute, expressed Constitutional provision, or some equally definite method, thus fixing a standard of conduct.

It would seem odd that the Congress of our country, which has welcomed persons from other lands, should protect our own citizens from abusive treatment by combinations of police officers and grant no such protection to our visitors and prospective citizens.

The above quoted expression from Judge Sibley's opinion finds ample support in the thorough, able and extremely well-reasoned opinion and order of Circuit Judge Morrow in *United States* v. *Wheeler*, 254 Fed. 611.

Indeed, we could not do better than quote the entire opinion as our brief since the authorities upon the question here involved have there been thoroughly considered and digested. We therefore invite the Court's attention to the case.

Briefly, the defendants in the cited case were indicted under Section 19 for conspiracy to deport certain citizens, some of whom were registered for military service under the Draft Act, from Arizona to New Mexico.

The Court held that the right to remain in one place or in one State, or to move freely from one State to an-

her, is not a right contemplated for protection under e Statute.

The question, which the Court answered in favor of e defendants, is stated thus, page 616:

"(4, 5) The question is broadly stated in the brief of the Assistant Attorney General in support of the indictment in this case as follows:

" 'We admit that the fundamental rights of a person as such or of a citizen as such, are not secured to him by the Constitution of the United States. The rights to life, liberty, and the pursuit of happiness, for instance, existed before the Constitution, were not created by it and hence are not secured by it, but by the Constitution and laws of the several states. If, however, these fundamental rights are brought into connection with the federal government, the situation is changed, and the right then becomes one secured by the Constitution of the United States.'

"He then proceeds to explain what he means by 'fundamental rights' being 'brought into connection with the federal government.'

" 'For example,' he says, 'ordinarily the right to remain in any one place, or to move freely from place to place, is not secured by the Constitution of the United States; but if state boundaries are brought into the question, if the right claimed be to remain in one of the several states of the federal Union, as distinguished from another, or to move freely from one of the several states into another state of the federal Union, it then becomes a right secured by the Constitution of the United States'—citing *Crandall* v. *Nevada*, 6 Wall. 35, 18 L. Ed. 745; *U. S.* v. *Patrick*, (C. C.) 54 Fed. 338-347."

In the final paragraph of the opinion, page 624, the urt asks a question which might well be asked here d in other similar cases where the Government seeks to

invade the province of the several States in order to attempt the execution of some program currently popular with federal authority:

> "(6) Why has this prosecution been brought in the federal court rather than in the state court, which had unquestioned jurisdiction of the offense charged? The Assistant Attorney General stated on the oral argument that it might be because there was such bias and prejudice in the community where the offense was committed against the persons complaining of the offense that the law of the state could not be enforced against the defendants. This is not a legal or constitutional ground of federal jurisdiction, although frequently urged as a ground of federal legislation covering subjects where local authority is unequal to the task of administering equal and exact justice to all; but it is difficult to understand the explanation in this case, if the large body of persons against whom the conspiracy is charged to have been directed were in fact *bona fide* citizens of the United States as claimed. Those that were citizens by naturalization proceedings were each required to prove to the satisfaction of the court by two witnesses at the time of naturalization that for five years prior thereto he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. Those that were native-born citizens should certainly have possessed an equally good moral character, have been equally loyal to the government of the United States, and equally attached to the principles of the Constitution of the United States, as those who had been naturalized. If this was the character of persons against whom the conspiracy was directed, we cannot understand why they could not submit their character and conduct to a tribunal in the community where they resided in proceedings against others for an open violation of the state law. The situation is indeed a lamentable one and one to be greatly deplored; but

it ought not to influence this court to enlarge the statute to include an offense not within its constitutional authority. As stated by the Supreme Court in *Hammer* v. *Dagenhart* (recently decided), 247 U. S. 251, 38 S. Ct. 529, 63 L. Ed. 1101:

" 'This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.' "

The decision in the cited case was affirmed by this Court in *United States* v. *Wheeler*, 254 U. S. 281, 65 L. Ed. 270.

II.

If Section 19 does contemplate conspiracy by police officers to employ third-degree methods in conducting investigations, a conviction can be upheld only if such officers wilfully intended as the object of the conspiracy to deprive citizens of rights secured by the Fourteenth Amendment, and the jury must be so instructed without equivocation.

Section 19, when applied to the due process clause of the Fourteenth Amendment is lacking in an ascertainable standard of guilt to the same extent that Section 20 would be lacking in such standard if the word "wilful" were omitted, and for the same reasons expressed in the Screws case.

The question is not whether the alleged conspirators "wilfully conspired" but whether they "conspired to wilfully deprive" citizens of rights secured by the amendment.

It can hardly be contended that the right to liberty is not a right which has been defined by judicial decision

and yet, as Judge Waller pointed out in his concurring opinion below, page 652 (R. 388):

> "If two or more policemen, in investigating a crime, should mistakenly arrest a citizen and hold him in jail for a reasonable time pending investigation, they would be liable, under Section 51, as written, to indictment, imprisonment for ten years, a fine of $10,000, and disbarment from holding any office or position of trust unless the statute required it to be alleged and proven that their acts were willful or in violation of a definite statute."

If the contention of the Government is to become established law, then the hands of law enforcement officers will be as effectively tied as if the Congress passed a law making it a felony for such officers to arrest any person unless his guilt is and can be established.

Judge Holmes opened his dissenting opinion with the statement, page 653:

> "We should not, I think, read the word *willfully* into the conspiracy statute on civil rights before the word *conspire*, as indicated in the majority opinion."

As we understand the majority opinion below, the word "willfully" is required to modify the act which is the object of the conspiracy and not as a modification of the word "conspire." At least, that was the contention of appellants below.

Naturally, if the object of the conspiracy is the commission of an act which has been made an offense by some definite provision of law such as a statutory or constitutional prohibition, then the objection of vagueness is removed and the word "willful" would be unnecessary, but when the rights secured are not defined by statute but can be found only in the great body of the law as set

up by judicial decisions, then, if we follow the Screws case, the objectionable feature can be overcome only by the use of the word "willful."

The trial defendants requested the District Court to charge the jury (R. 278) that:

> "* * * In this case, you must find a further fact that they intended willfully to do the act which was the object of the conspiracy.
>
> "Now, the word 'wilfully' has a meaning, and a very definite meaning, that must be carefully considered by you. In law, the use of the words, 'wilful' and 'wilfully,' imply a conscious purpose to do wrong. Doing a thing knowingly and wilfully implies not only a knowledge of the thing done, but a determination to do it with bad intent or with an evil purpose or motive. It is not sufficient that the defendants here had generally a bad purpose in doing the things they are alleged to have done, or that they went too far because of an excess of zeal in their desire to obtain confessions from the complaining witnesses."

The Court refused to give the quoted portion of the defendants' third requested charge and, in addition to the portion above quoted struck the words "wilful" and "wilfully" wherever they appear in such requested charge (R. 293, 322).

As regards intent the Court did deliver the following instructions:

> "In order to convict under this indictment, it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving the complaining witnesses of those rights guaranteed them under the Fourteenth Amendment to the Constitution of the United States, which are enumerated in the indictment * * *" (R. 322).

"* * * The proof, if any, of a general intent to do the complaining witnesses a wrong is not sufficient, but a specific intent to deprive them of a Constitutional right, as the object of the conspiracy, if any, is a burden the law casts upon the Government" (R. 323).

"To return a verdict of guilt, under this indictment, you must, therefore, answer the following question in the affirmative: Did the defendants, or any two or more of them, knowingly and intentionally enter into a conspiracy with the specific intent, knowingly, and while acting under color of the laws of the State of Florida, to deprive the prosecuting witnesses, or any of them, of those rights and privileges guaranteed them under the Fourteenth Amendment, which are enumerated in the indictment?" (R. 323.)

"* * * The gist of the charge of conspiracy is the intent. It is not sufficient for the Government to show that the defendants, or any of them, had a bad motive or intent. The Government must show that the defendants, or at least two or them, entered into a plan and scheme to specifically deprive either Robinson, Sturniolo, Priest or Purnell of their constitutional rights as charged in the indictment. If you find from the evidence that it was not the defendants' specific intent to deprive the complaining witnesses of their constitutional rights, even though they did not act as ordinary prudent persons would have acted, then you must find the defendants not guilty" (R. 328).

"* * * The Government must show that the defendants, or at least two of them, entered into a plan and scheme to specifically deprive either Robinson, Sturniolo, Priest or Purnell of their constitutional rights as charged in the indictment. If you find from the evidence that it was not the defendant's specific intent to deprive the complaining witnesses of their constitutional rights, even though they did not act as ordinary prudent persons would have

acted, then you must find the defendants not guilty' (R. 329).

It would appear from the foregoing that the trial Court did cover the question of specific intent in his charge to the jury even though he refused to use the words "wilful" or "wilfully," but the Court's attention is invited to an instruction given by the trial Court prior to the instructions above quoted (R. 319).

> "* * * While the parties to a conspiracy, if there is one, should be working together understandingly, *this does not mean that they would understand that what they were doing would be a violation of law.* All that is necessary is that they should understand what they are doing. If what they thus understandingly cooperate to do is a violation of law, in this case a deprivation of constitutional rights, then the conspiracy will have been established, *even though the participants did not know that what they were doing would in fact be deemed to have been a deprivation or violation of any person's constitutional rights*" (Emphasis supplied).

So, here we have a confusing situation created by the Court first charging in effect that not only is no specific intent required in order to convict but that no intent at all to deprive the complaining witnesses of constitutional rights is required, and then later charging that a specific intent is required in order that a conviction may be found.

By which instruction was the jury to be guided? The one last quoted is clearly in conflict with the decision of the United States Supreme Court in the Screws case.

If we assume that the jury listened to and attempted to understand and be guided by the trial Court's instructions, can we say that they could or would disregard the clear direction given in the last quoted charge that "even

though the participants did not know that what they were doing would in fact be deemed to have been a deprivation or violation of any person's constitutional rights," they would be guilty if what they understandingly cooperated to do is a violation of law, "in this case a deprivation of constitutional rights."

Certainly the defendants below could have had no "wilful" intent to deprive the complaining witnesses of rights secured to them by the Fourteenth Amendment if they did not know that what they were doing would in fact be deemed to have been a deprivation of constitutional rights.

In the case of *Mills* v. *United States*, 164 U. S. 644, where, in a conviction for rape committed in Indian territory, the trial court had given an insufficient charge as to the amount of force requisite to support a conviction, this Court, in reversing the trial court, said in part, page 649:

> "Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we cannot escape the fear that the error above pointed out may have found lodgement in the minds of the jury * * * Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine, * * *"

True, in the cited case, the Court was concerned because the death penalty had been imposed and because it was not wholly satisfied by the testimony of the complaining witness, but the principle there laid down applies as much to the case at bar as in the cited case.

Respondents are also supported in their contention here by the case of *Bollenbach* v. *United States*, 326 U. S. 607, 90 L. Ed. 350.

There it was said, *inter alia*, page 613:

"* * * A conviction ought not to rest on an equivocal direction to the jury on a basic issue.

"* * * The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks.

"* * * It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading."

The Circuit Court of Appeals, Eighth Circuit, in 1918 in *Dr. J. H. McLean Medicine Co.* v. *United States*, 253 Fed. 694, reversed the trial court in a conviction for violation of the Food and Drugs Act, where, in instructing the jury regarding the fraudulent character of statements made by the defendant, the court inadvertently said, page 696:

"'One who makes a false statement, not knowing whether it is true or false, is as guilty of wrong as the man who makes a false statement knowing it is false.'"

The appellate Court, after announcing the correct rule to be that in such cases, there must be proof of an actual intent to deceive, said page 696:

"Other portions of the charge correctly stated the rule as to the good faith of the defendant, but did not purport to correct the portion of the charge we have quoted, and did not cure the error, for the jury were

at liberty to follow the erroneous portion of the instructions. *Mills* v. *United States,"* cited *supra.*

In *Nicola* v. *United States,* 72 F. 2d 780, decided by the Circuit Court of Appeals, Third Circuit, August 9, 1934, it is said, page 787:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed, and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

In *Miller* v. *United States,* 125 F. 2d 968, decided by the Circuit Court of Appeals, Tenth Circuit, June 12, 1941, where the Court found that an instruction relating to the weight to be given character evidence was too narrow, it is said, page 972:

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom."

This error was noted by the appellate court even in the absence of exceptions by the defendants in the court below.

The Court's attention is also invited to the last paragraph of the cited case, page 973, where it is said:

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen."

In the case at bar, exceptions to the charges delivered by the trial Court, and to the refusal of the Court to give requested charges where such requests were refused, were duly noted as follows (R. 295):

> "The Court: I will note now an exception in favor of each and every party making request to the non-giving of the request as submitted or the giving of the same in an altered form, and I likewise note an exception to the giving of any request by the opposite party; that is, in favor of the opposite party, the giving of the request, or giving it in altered form. The usual exceptions are in favor of the Government and each and every of the defendant."

Prior to the charges being delivered by the Court, defense counsel also offered to present specific exceptions to the charges to be given and to the Court's refusal to give charges requested by the defendants, but this offer was refused by the Court, as is reflected by the transcript of trial proceedings (R. 304).

III.

The trial defendants, other than Williams, having been acquitted of committing the act which is made the object of the alleged conspiracy, and of aiding, abetting, counselling, commanding, inducing, procuring, inciting, encouraging, or assisting any one in its commission, cannot subsequently be legally convicted of such conspiracy upon evidence in all material respects the same as that adduced at the first trial, where evidence of conspiracy is confined to facts tending to prove commission of the act.

Prior to the finding of the indictment in the instant case, the trial defendants were tried by the same court

in cause numbered 7279-M-Criminal, now before this Court in Cause No. 365.*

A copy of the indictment in that case was offered and received as evidence in support of various defense motions but not as evidence to go to the jury and was marked defendants' Exhibit D (R. 254).

The indictment is in eight counts. The odd numbered counts charge the defendants with conspiracy under Section 19, and it may be noted, are in all material respects identical to the four counts of the indictment in the case at bar.

The even numbered counts of the prior indictment charge violations of Section 20 and in effect charge the commission of the substantive act which is made the object of the conspiracy in the odd numbered counts of that indictment and in the counts of the indictment in the case at bar.

The material portion of count numbered 2 of the prior indictment reads as follows:

> "On or about the 28th day of March, A. D. 1947, * * * Jay G. Williams, Joseph V. Perry and John S. Bombaci, all being then and there special police officers * * * of the City of Miami, Florida, acting under the laws of the State of Florida and the ordinances and regulations of the municipality of Miami * * * and Charles R. Ford, who was then and there a police officer employed by the municipality of Miami, State of Florida, acting under the laws of the State of Florida, and the ordinances and regulations of the municipality of Miami * * * defendants herein, did wil-

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*In the prior indictment, 7279, Dania Supply Company was designated as Lindsley Lumber Company, but this designation was changed to Dania Supply Company in the course of that trial.

fully, under color of the laws, statutes, ordinances, regulations, and customs of the State of Florida and of the municipality of Miami * * *, subject and cause to be subjected Frank J. Purnell, Jr., an inhabitant of the State of Florida, to deprivation of the rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States, to-wit, the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida; that is to say, on or about the 28th day of March, 1947, the defendants arrested and detained and caused to be arrested and detained the said Frank J. Purnell, Jr., and brought and caused him to be brought to and into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co., * * * in the said City of Miami, Florida, and did there detain the said Frank J. Purnell, Jr., and while he was so detained the defendants did then and there illegally strike, bruise, batter, beat, assault and torture the said Frank J. Purnell, Jr., in order illegally to coerce and force the said Frank J. Purnell, Jr., to make an admission and confession of his guilt in connection with the alleged theft of personal property, alleged to be the property of said Lindsley Lumber Co., and in order illegally to coerce and force the said Frank J. Purnell, Jr., to name and accuse other persons as participants in alleged thefts of personal property, alleged to be the property of the said Lindsley Lumber Co., and for the purpose of imposing illegal

summary punishment upon the said Frank J. Purnell, Jr.

"That at the time and places aforesaid, Andrew J. Yuhas and Lindsley Lumber Co., a corporation, defendants herein, well knowing all of the premises aforesaid, did * * * wilfully aid and abet in the commission by the defendants, Jay G. Williams, Joseph V. Perry and John S. Bombaci and Charles R. Ford, of the offenses described in this Count.

"In violation of Section 52, Title 18, United States Code (1946 Ed.)."

Counts 4, 6 and 8 substitute in place of the name Frank J. Purnell, Jr., the respective names of Chester H. Robinson, Henry W. Priest and John P. Sturniolo, as the person alleged to have been assaulted. In all other material respects, they are the same as Count 2.

The evidence adduced at the trial of cause numbered 7279 is before this Court with the record in the petition of J. G. Williams in cause numbered 365, and we submit that the testimony of Government witnesses in the prior trial is in substance the same as and differs in no material respect from that taken by the Government in the case at bar.

The evidence of the alleged conspiracy is confined to proof that the substantive act, the employment of third-degree methods, was committed by the trial defendants.

The testimony offered by the Government in both cases tended to prove that the complaining witnesses were taken to the "paint shack" on or about the dates stated in the indictments and were there assaulted and mistreated by the individual defendants named in the indictments while some of the defendants were police or special police officers in order that confessions might be obtained from the complaining witnesses.

In the prior case Williams was found guilty by the jury of violating the even numbered or substantive counts of the indictment charged under Section 20. All of the other defendants were found not guilty of those counts.

As to the odd numbered counts, charging conspiracy under Section 19, the jury were unable to agree and a mistrial as to such counts resulted.

Counsel is not unaware of the general rule that commission of a substantive offense and a conspiracy to commit that offense are separate and distinct offenses, so that one may be prosecuted for both crimes without being put twice in jeopardy, but in view of the similarity of the testimony offered in the two trials with which we are concerned, and especially in view of the trial Court's instructions to the jury in the prior trial, which resulted in acquittal of all defendants except Williams, we must and do contend that the question of whether or not the other defendants participated in any material way, as aiders, abettors or conspirators, has been determined adversely to the Government and is *res judicata*.

The instructions delivered by the Court in the prior trial, case No. 7279, were offered and received in the trial of the instant case in support of various defense motions and marked "Defendants' Exhibit E" (R. 321, 322, 328, 330, 332) and are before this Court with the record.

The pertinent instructions given at the prior trial are as follows:

> "That expression of 'color of law' does not mean that in your consideration of these counts, you should be bound by the question of whether every one of the defendants charged in these counts was a police officer. It is my recollection that under the evidence there is no proof that Bombaci was an officer, and

certainly Yuhas was not any kind of an officer, and of course the corporation was not an officer. But I wish to call your attention in that connection to what is known as the Federal 'aiding and abetting' statute. You will note from the indictment that Yuhas and the corporation are indicted for aiding and abetting, but that really makes no difference in view of the statute which I am about to read to you, which is as follows: 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal" (R. 321).

"I can't make it too emphatic to you, gentlemen, that mere presence when a crime is committed is, of course, not sufficient to render one guilty as aider or abettor. The fact that a person is present when a crime is committed and no more is not sufficient to convict him. There must be something to show that the person present and so charged, in some way procured, or incited, or encouraged, the act done by the actual perpetrator. But whether a person does in fact aid or abet another in the commission of a crime is a question for you to determine, from the circumstances of the case as well as the direct evidence" (R. 322).

"* * * I think I have already made it clear to you that if a person is present and aids and abets and encourages and any way assists them, he is guilty of the crime" (R. 328).

And again, in response to a question by one of the jurors, which is quoted below, the Court delivered a further charge:

"One of the Jurors: I think that one of the major points of the case at issue among the jury men is, if a person is present—which no doubt you remember as being brought out in this case—must that person be found guilty or not guilty, due to his presence in the room?

"The Court: I think it would help you to know the exact language of the statute, and the exact language of the statute is this: 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.'

"Mere presence when a crime is committed is, of course, not sufficient to render one guilty as aider or abettor. There must be something to show that the person present and so charged, in some way procured, or incited, or encouraged, the act done by the actual perpetrator. But whether a person does in fact aid or abet another in the commission of a crime is a question for the jury, which may be determined by circumstances as well as by direct evidence.

"I don't know if I gave you any examples or not. If you and I are walking down the street and we see some person coming along, and you say, 'I am going to hold that person up,' and possibly you yank out a gun and possibly do it. The fact that I am standing there and do not stop you would not make me guilty. But if I do anything—I don't have to grab him, I don't have to hit the person—*but if I do anything to encourage it;* if I should say, for instance, 'Go ahead. I'll watch'—or—'Well, that's a good idea.' If I do anything to aid, abet, encourage or counsel, that would make me guilty as a principal" (R. 330) (Emphasis supplied).

The Court delivered a further instruction to the jury in response to a question by one of the jurors.

"One of the Jurors: The mere presence of a man does not necessarily imply that he aided or abetted, does it?

"The Court: No, sir it does not. The mere fact that a man was present is not sufficient to convict him. If a man was merely present where a crime was committed, you should not convict him. If he is

present and in any way aided, abetted, encouraged, or gave counsel, then he would be guilty and should be convicted" (R. 332).

It is true that only Yuhas and Lindsley Lumber Company were charged with aiding and abetting in the prior indictment but the charges above stated are clearly not confined to them alone, for the Court said: "You will note from the indictment that Yuhas and the corporation are indicted for aiding and abetting, *but that really makes no difference* in view of the statute which I am about to read to you" (Emphasis supplied).

Under those instructions, if the jury had believed that any of the defendants had committed the act, or had aided, abetted, counseled, commanded, induced, procured, incited, encouraged, or assisted any one else in the commission of the act, it would have been their duty to convict him. The jury convicted only Williams and acquitted all of the others of the substantive offense.

Counsel have endeavored unsuccessfully to imagine a conspiracy in which at least one of the things listed above, all of which were included in the charge, was not done. We submit that such a conspiracy lies beyond the realm of conjecture, especially where the sole proof of conspiracy is proof of the commission of the substantive act.

The verdict in the prior trial determined that none of the defendants below, with the exception of Williams, committed the substantive act and also that they did not participate criminally in its commission; therefore, the verdict in the instant case is inconsistent with that in the prior case and should not be permitted to stand. Naturally, if the other defendants below did not conspire with Williams, he cannot be guilty of conspiring with them.

A man cannot conspire with himself. The statute, Section 19, uses the words "'two or more."

Williams attacked the indictment in the instant case by motion to dismiss, setting up his conviction in the prior case, No. 7279, and alleging that the evidence necessary to support the indictment in the case at bar would have been sufficient to procure his conviction under the first indictment, "as all charges against the defendant, Jay G. Williams, are based upon the same act," and that, because of such former jeopardy, his constitutional rights under the Fifth Amendment are violated (R. 10).

After the time fixed by the trial Court for attacking the indictment, but before the trial, the appellant Ford sought to amend his motion to dismiss, previously filed, in order to raise the question of *res judicata*. This motion was denied (R. 18-23). The question, however, was raised by objection throughout the trial to testimony offered by the Government tending to prove the events which transpired in the "paint shack" on or about the dates mentioned in the two indictments and by motions to strike such testimony upon the ground of *res judicata* (R. 42-44, 56, 72, 75, 77, 80-81).

The same point was also raised in motions for judgment of acquittal (R. 22, 24, 349), motions in arrest of judgment (R. 343, 346), and motions for a new trial (R. 345, 349).

The Court of Appeals did not determine that the issues determined in the prior trial precluded prosecution of the case at bar but stated page 650 (R. 384):

> "In the present case the direct evidence of conspiracy is slight, and absent as to some defendants, reliance being put on evidence that they were all present when the beatings and other things were done

and did not try to stop them, but did some things to help. The adjudication that only Williams did the wrong the others did not counsel, aid or abet him in doing it, would be very helpful to these others in rebutting the inference that there was a previous conspiracy to do it. For this evidentiary purpose the record and the charge of the court to show what was tried before, were admissible and it was error to exclude them."

The Government contends (Gov't. brief, p. 72) that *res judicata* is a plea in bar which presents a legal question, raising no issues of fact for the jury.

In this contention we are inclined to agree. The trial Court should have sustained our several motions and objections based upon this matter. However, the least that should have been done would have been to follow the procedure suggested by the Appeals Court.

The criteria laid down in the case of *Sealfon* v. *United States*, 332 U. S. 575, 92 L. Ed. 180, should have been followed.

The situation in the cited case is just the reverse of that in the case at bar. As stated by Mr. Justice Douglas, speaking for the Court, "This case presents the question whether an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense, on the particular facts here involved."

The petitioner, a dealer in sugar products, was indicted for conspiring with another, Greenberg, to defraud the United States by presenting false invoices of sales to agencies exempt from sugar rationing, for the purpose of obtaining an additional allotment. He and the alleged co-conspirator were also indicted for the substantive offense,

viz., uttering and publishing as true the false invoices. The conspiracy indictment was tried first and resulted in acquittal of the petitioner.

Petitioner and Greenberg were then tried for the substantive offense to which Greenberg plead guilty and "the trial proceeded against petitioner on the theory that he aided and abetted Greenberg" in its commission.

In stating the case, this Court said, in part, page 577:

> "* * * The false invoices, the letter from petitioner to Greenberg" (in which he stated "some of our syrups are being sold at the Brooklyn Navy Yard" and various defense plants) "and essentially the same testimony were again introduced against petitioner."

In the case at bar, the testimony offered by the Government in substance varied in no material respects from that offered in the prior trial.

In holding that the issues raised in the second trial were *res judicata* and that petitioner's conviction had there should accordingly be set aside, this Court said, *inter alia*, page 578:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses" (cases cited). "Thus with some exceptions, one may be prosecuted for both crimes.—But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings" (cases cited) "and operates to conclude those matters in issue which the verdict determined though the offenses be different" (Cases cited). "Thus the only question in this case is whether the jury's verdict in the conspiracy trial *was a determination favorable to petitioner of the facts essential to conviction* of the substantive offense. *This depends upon the facts ad-*

duced at each trial and the instructions under which the jury arrived at its verdict at the first trial" (Emphasis supplied).

The Court further said, page 580:

"* * * Thus the core of the prosecutor's case was in each case the same; the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecutor's case and which was necessarily *adjudicated* in the former trial to be non-existent. That the prosecution may not do" (Emphasis supplied).

In the case at bar, the core of the Government's case was criminal participation by the defendants in the mistreatment of the complaining witnesses. The only evidence offered to prove conspiracy was evidence tending to show actual participation in such mistreatment. It was a second attempt to prove such criminal participation after a jury had determined that the defendants, other than Williams, had not participated criminally in such mistreatment and that they had not aided or abetted Williams in any way in the commission of the act.

To say that this is anything more than a second prosecution for the same alleged offense is to distort the meaning of words common to our language, even to a greater extent than occurs when we say that the unlawful acts of a policeman are the acts of the State.

This case is nothing more than an attempt by the Government to have a fourth strike, regardless of the conspiracy fiction which makes two offenses out of one. Regardless of the strained logic which is employed to support the Government's contention, the practical result is that the defendants have suffered a deprivation of a right secured by the Fifth Amendment to the Constitution of the United States providing, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

We earnestly invite the Court's attention to the concurring opinion of Mr. Justice Jackson, in which Mr. Justice Frankfurter and Mr. Justice Murphy joined, in *Krulewitch* v. *United States*, 336 U. S. 440, 445, 93 L. Ed. 790, for a thorough and critical discussion of the employment by the Government of the several conspiracy statutes.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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JOINDER IN BRIEF.

The respondents, Jay G. Williams, John S. Bombaci, and Joseph V. Perry, join in and adopt the above and foregoing brief submitted on behalf of the respondent, Charles R. Ford.

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